JAN - 1979

MEMORANDUM TO WILLIAM H. WEBSTER, DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

Re: Proposed FBI File on Denials of SCI Access.

This memorandum responds to FBI Security Officer David Ryan's letter of December 15, 1978 (Attachment 1), asking our opinion regarding the proposed creation at the FBI of a controlled file that would contain information with respect to all individuals denied access to SCI by member agencies of the Intelligence Community. Mr. Ryan's proposal was itself a response to SECOM Chairman Robert W. Gambino, who, by letter dated September 7, 1978 (Attachment 2), asked you to consider the establishment of such a file at the FBI. We conclude that, although an argument can be made that the FBI's maintenance of such a file would be lawful, the Bureau, if it kept the file, would have to comply with the notice provisions of the Privacy Act of 1974, 5 U.S.C. § 552a(e)(3) (1976), which would, in some cases, frustrate the purposes of special access protection. Further, if such a file is to be created, the CIA, which is the more functionally appropriate repository for such a file, should maintain it and would be empowered to do so without any notice requirement.

The Privacy Act permits an agency to:

> maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President * * * .

DOJ Review Completed.

5 U.S.C. § 552a(e)(1) (1976). The only mandated purpose that might justify the creation of a central SCI access denial file at the FBI is the FBI's duty under Section 1-1403 of Exec. Order No. 12036, 43 Fed. Reg. 3674, 3684 (1978), to "support foreign intelligence collection requirements of other agencies within the Intelligence Community." Because the protection of sources and methods is a requirement of foreign intelligence collection, and the special access programs exist to help accomplish such protection, it could be argued that the maintenance of a central denial file, insofar as it facilitates effective special access administration, does support the foreign intelligence collection requirements of other agencies.

Under Exec. Order 12036, however, the FBI would not be the only agency empowered to maintain such a file; nor would it appear to be the most functionally appropriate repository.1/ The task of protecting sources and methods is assigned expressly to the DCI, § 1-604. He is further charged with promoting "the development and maintenance of services of common concern . . . on behalf of the Intelligence Community," § 1-601(e), and ensuring the establishment of "common security and access standards for managing and handling foreign intelligence systems, information, and products," § 1-601(l). In all these tasks, he is entitled to administrative support from the Central Intelligence Agency, § 1-813. Indeed, toward these ends, the Compartmented Intelligence Branch at the CIA already maintains a file of certain member agencies' SCI access clearances. The task of maintaining a central denials file would appear to fall

1/ Mr. Ryan's letter states that "individual components" of the Intelligence Community "are of the belief that the Privacy Act prohibits the individual Intelligence Community components from maintaining records" related to SCI denials because of 5 U.S.C. § 552a(e)(1). We do not agree with this view. Assuming that security investigations are themselves relevant and necessary to accomplish a lawfully mandated purpose by a component agency, the agency's maintenance of files to aid it in future investigations of the same persons is no less relevant or necessary to the same purposes.

more logically with the DCI, his staff, or the CIA, than with the FBI.2/

An FBI file on SCI access denials would, in addition, pose a problem with respect to the notice provisions of the Privacy Act. The FBI must comply with the notice provisions of 5 U.S.C. § 552a(e)(3) (1976) for those systems of records it maintains that are not related to criminal investigations.3/ Under the Act, each non-exempted agency that maintains a system of records must inform each individual whom it asks to supply information that may appear in that system of the authority for its solicitation, the purposes for its collection, the routine uses to which it may be put, and the effects of non-compliance with the request. In cases in which the FBI collects information for SCI clearances, it apparently would be required, if it maintained a file on SCI denials, to provide Privacy Act notices to those individuals from whom information was collected during those investigations. Such a practice would seem likely to undermine those SCI background checks that are now conducted without the knowledge of the individuals under investigation.

It should be noted that the creation of any central file on SCI access denials will pose certain legal and policy problems. First, the Privacy Act proscribes the maintenance, without consent, of any record describing how an individual exercises First Amendment rights, 5 U.S.C. § 552a(e)(7) (1976). No statutory exemption for any agency exists with respect to this provision. The proposed central form might well include such information. Because, in some cases, individuals are investigated for SCI without knowing

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2/ Although the maintenance of a file of SCI access denials would arguably be "necessary and relevant" to accomplish a purpose lawfully required of the DCI and the CIA as required by 5 U.S.C. § 552a(e)(1), the CIA, in any event, could promulgate a rule under 5 U.S.C. § 552a(j)(1) exempting its file from that requirement. The FBI could promulgate a rule exempting its file from the requirements of 5 U.S.C. § 552a(e)(1) only with respect to information, the disclosure of which would reveal the identities of confidential sources. 5 U.S.C. § 552a(k)(5).

3/ The CIA may exempt itself from the notice requirement, 5 U.S.C. 552a(j)(1) (1976).

the object of such an investigation, it would prove difficult with respect to those individuals to argue that even implied consent supported the maintenance of denial records in cases in which denials are predicated on ideological attitudes.

Further, unless rules are promulgated to proscribe the use as an automatic bar to SCI access of a record that a person has been denied access in the past, the potential exists for administrative abuse of a central denials file. Agencies might deem it unnecessary to undertake updated suitability investigations, although a prior denial might have been based on circumstances that have changed since that denial, or on a criterion unrelated to suitability, such as the conclusion of an agency's Security Officer that no need-to-know justified access at the time of original application. Any bar would prove unfair to individuals who are currently qualified for SCI access despite a prior denial of access. A bar would be inefficient if it caused agencies to bypass unnecessarily qualified individuals in its search for suitable people to fill sensitive positions.

Perhaps more troubling is the possibility that information regarding SCI access denials would be used inappropriately as derogatory information with respect to other employment-related investigations. The proper use of a central denials file would require a strict compartmentalization of access to such information on an individual's background.

Because the FBI is not the most logical repository for a file on denials of access to SCI and because of the Privacy Act problems that would arise were the FBI to maintain such a file, we recommend that the file not be established at the FBI. We further believe that, should the file be created at any agency, steps should be taken to prevent what seems, on its face, to be a strong possibility for administrative abuse of such a file.

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel